

1 O. Randolph Bragg, Esq. (ISB 6221983)  
2 rand@horwitzlaw.com  
3 *Admitted pro hac vice*  
4 Horwitz, Horwitz & Associates, Ltd.  
5 25 East Washington Street, Suite 900  
6 Chicago, IL 60602-1716  
7 Tel: (312) 372-8822  
8 Fax: (312) 372-1673

9 Ronald Wilcox, Esq. (CSB 176601)  
10 ronaldwilcox@post.harvard.edu  
11 2160 The Alameda First Floor, Suite F  
12 San Jose, CA 95126  
13 Tel: (408) 296-0400  
14 Fax: (408) 296-0486

15 Attorneys for Plaintiff  
16 Virginia Corsick

17 David Israel, Esq. (LSB 7174)  
18 disrael@sessions-law.biz  
19 *Admitted pro hac vice*  
20 SESSIONS, FISHMAN, NATHAN & ISRAEL,  
21 L.L.C.  
22 3850 N. Causeway Blvd., Ste. 200  
23 Metairie, LA 70002-7227  
24 Tel: (504) 828-3700  
25 Fax: (504) 828-3737

26 Debbie P. Kirkpatrick, Esq. (CSB 207112)  
27 dkirkpatrick@sessions-law.biz  
28 Sondra R. Levine, Esq. (CSB 254139)  
slevine@sessions-law.biz  
SESSIONS, FISHMAN, NATHAN & ISRAEL,  
L.L.P.  
3667 Voltaire Street  
San Diego, CA 92106  
Tel: (619) 758-1891  
Fax: (619) 222-3667

30 Attorneys for Defendant  
31 West Asset Management, Inc.

## 33 UNITED STATES DISTRICT COURT

### 35 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

37 VIRGINIA CORSICK,

38 Plaintiff,

39 vs.

40 WEST ASSET MANAGEMENT, INC.,

41 Defendant.

- 42 ) Case No. 09-CV-03053 JF
- 43 )
- 44 ) JOINT MOTION FOR CERTIFICATION
- 45 ) OF A SETTLEMENT CLASS AND
- 46 ) PRELIMINARY APPROVAL OF CLASS
- 47 ) ACTION SETTLEMENT AGREEMENT
- 48 ) AND NOTICE TO THE CLASS
- 49 )
- 50 ) Hearing Date: July 23, 2010
- 51 ) Hearing Time: 9:00 a.m.
- 52 ) Courtroom 3, 5<sup>th</sup> Floor
- 53 )

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. PROCEDURAL HISTORY AND FACTS .....	1
III. PROPOSED CLASS ACTION SETTLEMENT .....	2
A. <i>Certification of a Settlement Class</i> .....	2
B. <i>Class Notice</i> .....	2
C. <i>Class Member Right To Opt-Out</i> .....	2
D. <i>Relief to Plaintiff and the Class</i> .....	3
E. <i>Attorneys' Fees, Costs, and Expenses</i> .....	3
IV. LAW AND ARGUMENT .....	3
A. <i>Fed. R. Civ. P. 23 (A) Requirements Are Satisfied</i> .....	3
1. <i>Numerosity</i> .....	4
2. <i>Commonality</i> .....	5
3. <i>Typicality</i> .....	6
4. <i>Adequacy of Representation</i> .....	7
B. <i>Fed. R. Civ. P. 23 (B) Requirements Are Satisfied</i> .....	9
C. <i>The Proposed Settlement Is Fundamentally Fair, Reasonable, And Adequate</i> .....	10
1. <i>The Strength Of The Lawsuit And The Risk, Expense, Complexity, And Likely Duration Of Further Litigation</i> .....	11
2. <i>The Amount Offered In Settlement</i> .....	11
A. <i>Relief to the Class</i> .....	11
B. <i>Recovery and Incentive Award to Class Representative</i> .....	12

1	<i>C. Cy Pres Award</i> .....	14
2	<i>D. Attorney's Fees, Costs and Expenses.</i> .....	14
3	<i>3. The Experience And View Of Class Counsel</i> .....	14
4	<i>4. The State Of The Proceedings And The Amount Of Discovery Completed</i> .....	15
5	<i>D. Class Action Is Superior To Other Available Methods Of Resolving The Controversy</i> .....	15
6		
7	<b>V. CONCLUSION</b> .....	17
8		
9		
10		
11		
12	<b><u>Appendices</u></b>	
13	<b>Appendix A –Class Action Settlement Agreement</b>	
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

## **TABLE OF AUTHORITIES**

### **Statutes/Secondary Authority**

15 U.S.C. § 1692 . . . . .	1
15 U.S.C. § 1692k . . . . .	4, 9, 11, 12, 14
Fed. R. Civ. P. 23 (a) . . . . .	3, 4, 7, 8
Fed. R. Civ. P. 23 (b) . . . . .	2, 3, 9, 16, 17
Fed. R. Civ. P. 23 (e) . . . . .	10, 17
Cal. Code Civ. § 1788 . . . . .	1, 13, 15
Cal. Code Civ. § 1788.17 . . . . .	12
Cal. Code Civ. § 1788.30 . . . . .	12, 14

## Cases

<i>Abels v. JBC Legal Group, P.C.</i> 227 F.R.D. 541, (N.D. Cal. 2005) . . . . .	8, 9
<i>Amchem Products, Inc. v. Windsor</i> 521 U.S. 591 (1997) . . . . .	3, 4, 9
<i>American Finance System, Inc. v. Harlow</i> 65 F.R.D. 94 (D.Md. 1974) . . . . .	6
<i>Appleyard v. Wallace</i> 754 F.2d 955 (11 <sup>th</sup> Cir. 1985) . . . . .	7
<i>Ballard v. Equifax Check Services, Inc.</i> 186 F.R.D. 589 (E.D. Cal. 1999) . . . . .	15, 16
<i>Blackie v. Barrack</i> 524 F.2d 891 (9 <sup>th</sup> Cir. 1975) . . . . .	4

1	<i>Bonett v. Educ. Debt Servs.</i>	
2	No. 01-6528, 2003 U.S. Dist. LEXIS 9575 (E.D. Pa., May 11, 2003) . . . . .	13
3	<i>Brink v. First Credit Resources</i>	
4	185 F.R.D. 567 (D. Ariz 1999) . . . . .	4
5	<i>Carrizosa v. Stassinos</i>	
6	669 F. Supp.2d 1081 (N.D. Cal. 2008) . . . . .	8
7	<i>Clark v. Bonded Adjustment Co. Inc.</i>	
8	204 F.R.D. 662 (E.D. Wash. 2002) . . . . .	4, 16
9	<i>Campion v. Credit Bureau Servs.</i>	
10	206 F.R.D. 663 (E.D. Wash. March 16, 2001) . . . . .	4
11	<i>Cook v. Niedert</i>	
12	142 F.3d 1004 (7 <sup>th</sup> Cir. 1998) . . . . .	13
13	<i>De La Fuente v. Stokley-Van Camp, Inc.</i>	
14	713 F.3d 225 (7 <sup>th</sup> Cir. 1983) . . . . .	7
15	<i>del Campo v. American Corrective Counseling Services, Inc.</i>	
16	254 F.R.D. 585(N.D. Cal 2008) . . . . .	5, 8
17	<i>Drossin v. National Action Financial Services, Inc.</i>	
18	225 F.R.D. (S.D. Fla. 2009) . . . . .	5
19	<i>Duran v. Credit Bureau of Yuma, Inc.</i>	
20	93 F.R.D. 607 (D. Ariz. 1982) . . . . .	4
21	<i>Epstein v. MCA, Inc.</i>	
22	179 F.3d 641 (9 <sup>th</sup> Cir. 1999) . . . . .	7
23	<i>Fry v. Hayt, Hayt &amp; Landau</i>	
24	198 F.R.D. 461 (E.D. Pa. 2000) . . . . .	13
25	<i>Gay v. Waiters' and Dairy Lunchmen's Union</i>	
26	549 F2d. 1330 (9 <sup>th</sup> cir. 1977) . . . . .	4
27	<i>General Telephone Co. of Southwest v. Falcon</i>	
28	457 U.S. 147 (1982) . . . . .	6

1	<i>Georgine v. Amchem Products, Inc.</i>	
2	83 F.3d 610 (3d Cir. 1996) . . . . .	15
3	<i>Gross v. Washington Mut. Bank, F.A.</i>	
4	No. 02 cv 4135 (RML), 2006 U.S. Dist. LEXIS 16975 (E.D.N.Y. Feb. 9, 2006) . . . . .	13
5	<i>Hanlon v. Chrysler Corp.</i>	
6	150 F.3d 1011 (9 <sup>th</sup> Cir. 1998) . . . . .	5, 6, 9, 16
7	<i>Harris v. Palm Springs Alpine Estate, Inc.</i>	
8	329 F.2d 909 (9 <sup>th</sup> Cir. 1964) . . . . .	6
9	<i>Hassine v. Jeffes</i>	
10	846 F.2d 169 (3d Cir. 1988) . . . . .	6, 8
11	<i>Haynes v. Logan Furniture Mart, Inc.</i>	
12	503 F.2d 1161 (7 <sup>th</sup> Cir. 1974) . . . . .	16
13	<i>Henderson v. Eaton</i>	
14	No. 01-0138, 2002 U.S. Dist. LEXIS 20840 (E.D. La, Oct. 25. 2002) . . . . .	13
15	<i>Hunt v. Check Recovery Systems, Inc.</i>	
16	241 F.R.D. 505 (N.D. Cal., 2007) . . . . .	8
17	<i>In re Drexel Burnham Lambert Group, Inc.</i>	
18	960 F. 2d 285 (2d Cir. 1992) . . . . .	8
19	<i>Irwin v. Mascott</i>	
20	96 F. Supp .2d 968 (N.D. Cal. 1999) . . . . .	4, 16
21	<i>Keele v. Wexler</i>	
22	149 F.3d 589 (7 <sup>th</sup> Cir. 1998) . . . . .	4, 6, 7
23	<i>Kornberg v. Carnival Cruise Lines, Inc.</i>	
24	741 F.2d 1332 (11 <sup>th</sup> Cir. 1984) . . . . .	6, 7
25	<i>Lerwill v. Inflight Motion Picture Inc.</i>	
26	582 F. 2d 507, (9 <sup>th</sup> Cir. 1978) . . . . .	7
27	<i>Linney v. Cellular Alaska Partnership</i>	
28	151 F.3d 1234 (9 <sup>th</sup> Cir. 1998) . . . . .	10, 16

1	<i>Molski v. Gleich</i> 318 F.3d 937 (9 <sup>th</sup> Cir. 2003) . . . . .	10
3	<i>Officers for Justice v. Civil Service Com'n of City and County of San Francisco</i> 688 F. 2d 615 (9 <sup>th</sup> Cir. 1982) . . . . .	10
5	<i>Purdie v. Ace Cash Express, Inc.</i> No. 3:01-CV-1754L, 2003 U.S. Dist LEXIS 22547 (N.D. Tex. Dec. 11, 2003) . . . . .	13
7	<i>Riordan v. Smith Barney</i> 113 F.R.D. 60 (N.D. Ill 1986). . . . .	4
9	<i>Rosario v. Livaditis</i> 963 F. 2d 1013 (7 <sup>th</sup> Cir. 1992). . . . .	7
11	<i>Rossini v. Ogilvy &amp; Mather, Inc.</i> 798 F.2d 590 (2d Cir. 1986) . . . . .	7
13	<i>Sledge v. Sands</i> 182 F.R.D. 255 (N.D. Ill. 1988). . . . .	4
15	<i>Staton v. Boeing Co.</i> 327 F.3d 938 (9 <sup>th</sup> Cir. 2003) . . . . .	5, 12, 13
17	<i>Schwarm v. Craighead</i> 223 F.R.D. 655 (E.D. Cal., 2006) . . . . .	8
19	<i>Wetzel. v. Liberty Mutual Ins. Co.</i> 508 F. 2d 239 (3d Cir. 1975) . . . . .	7
21	<i>Wyatt v. Creditcare, Inc.</i> 2005 WL 2780684 (N.D. Cal., 2005) . . . . .	8
23	<i>Zinberg v. Washington Bancorp., Inc.</i> 138 F.R.D. 397 (D.N.J. 1990) . . . . .	16
25	<i>Zinser v. Accufix Research Inst., Inc.</i> 253 F.3d 1180 (9 <sup>th</sup> Cir. 2001). . . . .	4

## **I. INTRODUCTION**

NOW INTO COURT, through undersigned counsel, come plaintiff, Virginia Corsick (hereinafter referred to as "Plaintiff"), and defendant West Asset Management, Inc. (hereinafter referred to as "West" or "Defendant") (jointly referred to as the "Parties"), and jointly move for certification of a settlement class, preliminary approval of the Class Action Settlement Agreement, and approval of notice to the class.

## II. PROCEDURAL HISTORY AND FACTS

1. On July 7, 2009, Plaintiff filed a class action complaint (hereinafter referred to as the “Lawsuit”) against West, asserting class claims under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, *et seq.*, and the Rosenthal Act (“Rosenthal Act”), Cal. Civil Code § 1788, *et seq.* Plaintiff alleged specifically that West telephoned Plaintiff and Class Members and left a certain voice mail message that failed to meaningfully disclose West’s identity or provide notices required by the FDCPA and Rosenthal Act.

2. The content of the message at issue (hereinafter “Telephone Message”) is as follows:

This is not a sales call. When you receive this message please call West Asset Management at 866-882-5878 or you may press one on your telephone to be transferred to an agent. West Asset Management thanks you for your prompt reply; once again that number is 866-882-5878.

3. In an attempt to settle the Lawsuit, the Parties participated in extensive settlement discussions. A mediation was scheduled for March 9, 2010 before court-

1 appointed mediator Carol L. Woodward. As the result of settlement negotiations  
2 between the parties, a settlement was reached on March 3, 2010. On June 16, 2010, the  
3 Parties entered into the Class Action Settlement Agreement (“Agreement”) to  
4 memorialize the final and complete settlement reached between the Parties. The  
5 Agreement is attached hereto as Appendix A.

6

7 **II. PROPOSED CLASS ACTION SETTLEMENT**

8

9 **A. Certification Of A Settlement Class**

10 For settlement purposes only, the Parties seek, pursuant to Fed. R. Civ P. 23(b)(3),  
11 preliminary certification of a class consisting of all natural persons residing in California  
12 who meet the following criteria: (a) he/she received the Telephone Message from West;  
13 (b) in an attempt to collect a debt incurred to Good Samaritan Hospital for medical  
14 services; (c) during the time period July 7, 2008 to the date of entry of the Order of  
15 Preliminary Approval. West represents there are 3,986 potential Class Members.

16

17 **B. Class Notice**

18 Defendant proposes notice be given to the Class Members in the form represented  
19 by Exhibit C to the Agreement by First Class U.S. Mail after updating addresses for Class  
20 Members as provided in paragraph 9.A. of the Agreement.

21

22 **C. Class Member Right To Opt-Out**

23 Class members may seek to be excluded from the Agreement and the lawsuit by  
24 opting out of the settlement class within the time period set by this Court. Any member  
25 who opts out of the settlement class shall not be bound by the terms of the Agreement

1 and shall not be entitled to any of the monetary benefits set forth in the Agreement.  
2

3 **D. Relief to Plaintiff and the Class**

4 Defendant shall pay to Plaintiff \$2,000 as statutory damages and \$1,000 as an  
5 incentive award for a total of \$3,000. West shall pay to each Class Member who does not  
6 timely exclude himself or herself from the class a settlement check in the amount of a  
7 pro-rata share of the total aggregate class settlement of One Hundred Twenty-Two  
8 Thousand Six Hundred Forty-Seven Dollars (\$122,647) ("Class Settlement Fund").  
9 Based on the total aggregate amount of the Class Settlement Fund and the total Class of  
10 3,986 potential members, each pro-rata share is anticipated to be not less than \$30.77.  
11 Funds from any returned or un-cashed settlement checks shall be paid by West to Santa  
12 Clara Law School Legal Clinic as a *cy pres* award.  
13

14 **E. Attorneys' Fees, Costs, and Expenses**

15 Pursuant to the Agreement, Plaintiff's counsel will file a petition prior to the final  
16 approval hearing in support of their application for attorneys' fees, costs and expenses.  
17 West will not object to the petition provided it seeks no more than \$20,750 in attorneys'  
18 fees, costs and expenses.  
19

20 **IV. LAW AND ARGUMENT**

21 **A. Fed. R. Civ. P. 23(A) Requirements Are Satisfied**

22 In order for a class to be certified, all four requirements of Rule 23 (a) must be  
23 satisfied along with one of the three categories of Rule 23 (b). *Amchem Products, Inc. v.*  
24 *Windsor*, 521 U.S. 591, 614 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d  
25

1 1180, 1186 (9<sup>th</sup> Cir. 2001); *Keele v. Wexler*, 149 F.3d 589, 594 (7<sup>th</sup> Cir. 1998). When  
2 evaluating a motion for class certification, “the court is bound to take the substantive  
3 allegations of the complaint as true.” *Blackie v. Barrack*, 524 F.2d 891, 901, n.17 (9<sup>th</sup> Cir.  
4 1975).

5 Congress expressly recognized the propriety of a class action under the FDCPA by  
6 providing special damage provisions and criteria in 15 U.S.C. §§ 1692k(a)(2)(B) and  
7 (b)(2) for FDCPA class action cases. *See Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill.  
8 1998); *Keele, supra*; *Clark v. Bonded Adjustment Co. Inc.*, 204 F.R.D. 662 (E.D. Wash.  
9 2002); *Campion v. Credit Bureau Servs.*, 206 F.R.D. 663 (E.D. Wash., March 16, 2001);  
10 *Brink v. First Credit Resources*, 185 F.R.D. 567 (D. Ariz. 1999); *Irwin v. Mascott*, 96  
11 F.Supp.2d 968 (N.D. Cal. 1999); *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607  
12 (D. Ariz. 1982). Class treatment is appropriate in this class because the proposed class  
13 meets the requirement for certification.

14 **1. Numerosity**

15 There are 3,986 potential members of the class and therefore the class is “so  
16 numerous that joinder of all members is impracticable.” Fed.R.Civ.P. 23 (a)(1); *Gay v.*  
17 *Waiters’ and Dairy Lunchmen’s Union*, 549 F2d. 1330, 1332 n.3 (9<sup>th</sup> Cir. 1977). “When  
18 the class is large, numbers alone are dispositive . . . .” *Riordan v. Smith Barney*, 113  
19 F.R.D. 60, 62 (N.D. Ill 1986).

20 ///

21 ///

1                   2. **Commonality**

2                   Rule 23(a)(2) requires that there be a common question of law or fact. A common  
3                   nucleus of operative facts is usually enough to satisfy the commonality requirement of  
4                   Rule 23(a)(2). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9<sup>th</sup> Cir. 1998). Where the  
5                   defendant has engaged in standardized conduct toward members of the proposed class by  
6                   leaving pre-recorded messages of identical content the commonality requirement is met.  
7

8  
9                   See, e.g., *del Campo v. American Corrective Counseling Services, Inc.*, 254 F.R.D. 585  
10                   (N.D. Cal 2008)(commonality requirement satisfied where all consumers received  
11                   standardized phone calls); *Drossin v. National Action Financial Services, Inc.*, 255  
12                   F.R.D. (S.D. Fla. 2009)(commonality requirement satisfied where plaintiff alleged she  
13                   received automated telephone calls from debt collection agency).

14  
15                   The commonality requirement is met here. The putative class claims stem from  
16                   the same alleged conduct, *i.e.*, West leaving Class Members pre-recorded messages of  
17                   identical content. There are questions of law and fact common to the class which  
18                   questions predominate over any questions affecting only individual class members.  
19  
20                   Plaintiff alleged that the Telephone Message violated the FDCPA and the Rosenthal Act  
21                   by failing to meaningfully disclose West's identity or provide notices required by the  
22                   FDCPA and Rosenthal Act. Plaintiff and the class are therefore united by these common  
23                   issues.

24  
25                   “All questions of fact and law need not be common to satisfy the rule.” *Staton v.*  
26                   *Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Common legal issues with divergent fact

1 patterns is sufficient, as is common facts coupled with divergent legal remedies. *Id.* “A  
2 sufficient nexus is established if the claims or defenses of the class and the class  
3 representatives arise from the same event or pattern or practice and are based on the same  
4 legal theory.” *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11<sup>th</sup> Cir.  
5 1984); *see also Hassine v. Jeffes*, 846 F.2d 169, 177 (3<sup>d</sup> Cir. 1988).

6  
7 The commonality requirement of Fed. R. Civ. P. Rule 23 (a)(2) is satisfied “where  
8 the question of law linking the class members is substantially related to the resolution of  
9 the litigation even though the individuals are not identically situated.” *American Finance*  
10 *System, Inc. v. Harlow*, 65 F.R.D. 94, 107 (D.Md. 1974) *citing Harris v. Palm Springs*  
11 *Alpine Estates, Inc.*, 329 F.2d 909 (9<sup>th</sup> Cir. 1964). FDCPA claims based on standard  
12 practices are well suited for class certification. *Keele, supra*, at 594.

13  
14 **3. Typicality**

15  
16 “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with  
17 those of absent class members; they need not be substantially identical.” *Hanlon, supra*,  
18 at 1020. The typicality requirement tends to merge with the commonality requirement, as  
19 both “serve as guideposts for determining whether under the particular circumstances  
20 maintenance of a class action is economical and whether the named plaintiff’s claim and  
21 the class claims are so interrelated that the interests of the class members will be fairly  
22 and adequately protected in their absence.” *General Telephone Co. of Southwest v.*  
23 *Falcon*, 457 U.S. 147, 157 n. 13 (1982).

1 A plaintiff's claim is typical if it arises from the same event  
2 or practice or course of conduct that gives rise to the claims  
3 of other class members and his or her claims are based on the  
4 same legal theory. The typicality requirements may be  
5 satisfied even if there are factual distinctions between the  
6 claims of the named plaintiff and those of other class  
7 members. Thus, similarity of legal theory may control even  
8 in the face of differences of fact.

9  
10 *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.3d 225, 232 (7<sup>th</sup> Cir. 1983)(citations  
11 omitted); *see also Appleyard v. Wallace*, 754 F.2d 955, 958 (11<sup>th</sup> Cir. 1985); *Rossini v.*  
12 *Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986); *Kornberg, supra*, at 1337;  
13 *Rosario v. Livaditis*, 963 F. 2d 1013, 1018 (7<sup>th</sup> Cir. 1992); *Keele, supra*, at 595.

14  
15 In this case, typicality is inherent in the class definition, *i.e.*, each of the class  
16 members potentially received the same telephone message as Plaintiff and each putative  
17 class member was subjected to the same alleged violations of the FDCPA and Rosenthal  
18 Act. Thus, the typicality requirement of Rule 23 (a)(3) is satisfied.

19  
20 **4. Adequacy of Representation**

21 Rule 23(a)(4) requires that the named plaintiff provide fair and adequate  
22 protection for the interests of the class. *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9<sup>th</sup> Cir.  
23 1999). That protection involves two factors: (1) whether plaintiff's counsel are qualified,  
24 experienced, and generally able to conduct the proposed litigation, and (2) whether the  
25 plaintiff has interests antagonistic to those of the class. *Lerwill v. Inflight Motion Picture,*  
26 *Inc.*, 582 F. 2d 507, 512 (9<sup>th</sup> Cir. 1978); *see also Wetzel v. Liberty Mutual Ins. Co.*, 508

1 F. 2d 239, 247 (3d Cir. 1975); *Hassine, supra*, at 179; *In re Drexel Burnham Lambert*  
2 *Group, Inc.*, 960 F. 2d 285, 291 (2d Cir. 1992).

3 Virginia Corsick understands her responsibilities as class representative (see  
4 *Declaration of Virginia Corsick* filed herewith; hereinafter “Corsick Decl.”).  
5 Furthermore, Plaintiff’s counsel, O. Randolph Bragg, Esq., Horwitz, Horwitz &  
6 Associates, and Ronald Wilcox, Esq. are experienced in consumer litigation, including  
7 extensive experience in pursuing class action suits. Mr. Bragg and Mr. Wilcox have  
8 served together as class counsel in the following cases: *Carrizosa v. Stassinos*, 669  
9 F.Supp.2d 1081 (N.D. Cal., 2009); *del Campo v. American Corrective Counseling*  
10 *Services*, 254 F.R.D. 585 (N.D. Cal., 2008); *Hunt v. Check Recovery Systems, Inc.*, 241  
11 F.R.D. 505 (N.D. Cal., 2007); *Schwarm v. Craighead*, 233 F.R.D. 655 (E.D. Cal., 2006);  
12 *Wyatt v. Creditcare, Inc.*, 2005 WL 2780684 (N.D. Cal., 2005); and *Abels v. JBC Legal*  
13 *Group, P.C.*, 227 F.R.D. 541 (N.D. Cal., 2005). They have also served as class counsel  
14 separately in numerous other cases.

15 As to the second relevant consideration under Rule 23(a)(4), the interests of the  
16 named Plaintiff are coincident with the interests of the class. Given the identical nature  
17 of the claims between Plaintiff and the class members, there is no potential for conflicting  
18 interests in this action. Further, there is no antagonism between the interests of the  
19 named Plaintiff and those of the class. Moreover, Plaintiff has prosecuted, and will  
20 continue to prosecute, the action vigorously. Thus, Plaintiff has satisfied the adequacy of  
21 representation requirement of Rule 23(a)(4).

1           **B. Fed. R. Civ. P. 23(B) Requirements Are Satisfied**

2           “In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class  
3 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”

4  
5           *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23 (b)(3) requires  
6 that the questions of law or fact common to all members of the class predominate over  
7 questions pertaining to individual members. *Hanlon, supra*, at 1019. This criterion is  
8 normally satisfied when there is an essential common factual link between all class  
9 members and the defendant for which the law provides a remedy. *See Abels v. JBC Legal*  
10  
11           *Group, P.C.*, 227 F.R.D. 541, 547 (N.D. Cal. 2005). In this case, the “common nucleus  
12 of operative fact” is that all class members, by definition, were potentially subjected to a  
13 telephone message of identical content from Defendant which is alleged to have violated  
14 the FDCPA and Rosenthal Act. The legal issues arising from Defendant’s telephone  
15 message are the same for each class member.

16           Because of the standardized nature of Defendant’s conduct, common questions  
17 predominate. In this case, the factual issues and questions of law applicable to the class  
18 predominate over any individual questions. In this case, this necessary link exists in that  
19 all class members, by definition, were subjected to the same alleged violations as the  
20 named Plaintiff, and the FDCPA provides a remedy tailored specifically for class claims.

21  
22           *See 15 U.S.C. § 1692k(a)(2)(B).*

23           ///

24  
25           ///

1                   **C. The Proposed Settlement Is Fundamentally Fair, Reasonable, And Adequate**

2                   “Unlike the settlement of most private civil actions, class actions may be settled  
3                   only with the approval of the district court.” *Officers for Justice v. Civil Service Com’n*  
4                   *of City and County of San Francisco*, 688 F.2d 615, 623 (9th Cir. 1982). The court may  
5                   approve a settlement that would bind class members “only after a hearing and on finding  
6                   that [the settlement] is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The  
7                   Court’s fairness determination involves a balancing of several factors, which may include  
8                   some or all of the following: “the strength of plaintiffs’ case; the risk, expense,  
9                   complexity, and likely duration of further litigation; the risk of maintaining class action  
10                  status throughout the trial; the amount offered in settlement; the extent of discovery  
11                  completed, and the stage of the proceedings; the experience and views of counsel; the  
12                  presence of a governmental participant; and the reaction of the class members to the  
13                  proposed settlement.” *Officers for Justice, supra*, at 625; *see also Linney v. Cellular*  
14                  *Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998); *Molski v. Gleich*, 318 F.3d 937,  
15                  953 (9<sup>th</sup> Cir. 2003). “The relative degree of importance to be attached to any particular  
16                  factor will depend upon and be dictated by the nature of the claim(s) advanced, the  
17                  type(s) of relief sought, and the unique facts and circumstances presented by each  
18                  individual case.” *Officers for Justice, supra*, at 625.

25                  While it is too early to address the last factor, *i.e.*, the class members’ reaction to  
26                  the proposed settlement, application of the other relevant factors confirms that the  
27                  proposed settlement should be preliminarily approved.

1                   **1. The Strength Of The Lawsuit And The Risk, Expense, Complexity, And Likely**  
2                   **Duration Of Further Litigation**

3                   West has raised defenses to the class claims, which West avers would ultimately  
4                   defeat the claims of the putative class. Additionally the class is over-inclusive in that it  
5                   includes individuals who potentially received the telephone message at issue but for  
6                   whom receipt of the message cannot be confirmed. Litigation in this matter will continue  
7                   unless a settlement can be reached. Settlement eliminates any further risk and expense  
8                   for the Parties. Considering the potential risks and expenses associated with continued  
9                   prosecution of the Lawsuit, the probability of appeals, the certainty of delay, and the  
10                   ultimate uncertainty of recovery through continued litigation, the proposed settlement is  
11                   fair, reasonable, and adequate.

15                   **2. The Amount Offered In Settlement**

16                   **A. Relief to the Class**

17                   The proposed settlement provides that each class member who does not timely  
18                   exclude himself or herself from the class shall be entitled to a settlement check in the  
19                   amount of a pro-rata share of the class settlement fund. Based on the total aggregate  
20                   amount of the class settlement fund of One Hundred Twenty-Two Thousand Six Hundred  
21                   Forty-Seven Dollars (\$122,647) and the total class of 3,986 potential members, each pro-  
22                   rata share is anticipated to be not less than \$30.77.

25                   If West was liable on a class basis, West's maximum liability per 15 U.S.C. §  
26                   1692k could be approximately \$143,000, representing 1% of its \$14.3 million net worth.

1 While disputed as a matter of law by West, Plaintiff avers West's maximum liability  
2 could be approximately \$286,000, representing 1% of its \$14.3 million net worth per 15  
3 U.S.C. § 1692k plus 1% of its \$14.3 million net worth per Cal. Civil Code § 1788.17.  
4 Considering the uncertainties of trial, the difficulty in ultimately proving liability against  
5 West, and that West's liability under the FDCPA (the law that primarily regulates West's  
6 business) is at best for the Plaintiffs capped at approximately \$143,000 per 15 U.S.C. §  
7 1692k, or \$286,000 under the disputed interpretation that recovery is permitted under  
8 both 15 U.S.C. § 1692k and Cal. Civil Code § 1788.17, the proposed settlement is clearly  
9 fair, reasonable, and adequate.

10

11 ***B. Recovery and Incentive Award to Class Representative***

12

13 The proposed settlement provides that West shall pay Plaintiff \$2,000 in statutory  
14 damages pursuant to the FDCPA and Rosenthal Act plus \$1,000 as an incentive award  
15 for a total of \$3,000. The FDCPA provides for statutory damages of up to \$1,000 to an  
16 individual plaintiff. 15 U.S.C. § 1692k(a). The Rosenthal Act provides for statutory  
17 damages of up to \$1,000 for a willful and knowing violation of the statute. Cal. Civ.  
18 Code § 1788.30. Named plaintiffs are also “eligible for reasonable incentive payments”  
19 and “[t]he district court must evaluate their awards individually, using ‘relevant factors  
20 includ[ing] the actions the plaintiff has taken to protect the interests of the class, the  
21 degree to which the class has benefitted from those actions, ... [and] the amount of time  
22 and effort the plaintiff expended in pursuing the litigation ....’” *Staton v. Boeing Co.*, 327  
23  
24  
25  
26  
27  
28

1 F.3d 938, 977 (9th Cir. 2003) (*citing Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.  
2 1998)).  
3

4 The \$1,000 incentive award to Plaintiff is fair and just. Many district courts have  
5 approved incentive awards in FDCPA class action lawsuits. *See, e.g., Gross v.*  
6 *Washington Mut. Bank, F.A.*, No. 02 cv 4135 (RML), 2006 U.S. Dist. LEXIS 16975,  
7 \*18-\*19 (E.D.N.Y. Feb. 9, 2006) (approving payment of \$5,000 for the class  
8 representative's services in FDCPA class action); *Purdie v. Ace Cash Express, Inc.*, No.  
9 3:01-CV-1754L, 2003 U.S. Dist LEXIS 22547, \*24-25 (N.D. Tex. Dec. 11, 2003) (in a  
10 case involving FDCPA claims the court approved combined incentive payments of  
11 \$16,665 to the three named plaintiffs); *Bonett v. Educ. Debt Servs.*, No. 01-6528, 2003  
12 U.S. Dist. LEXIS 9757, \*23 (E.D. Pa., May 11, 2003) (compensating plaintiff \$3,000 for  
13 her service as class representative in FDCPA action where 284 class members each  
14 received \$77.46); *Henderson v. Eaton*, No. 01-0138, 2002 U.S. Dist. LEXIS 20840, \*17-  
15 \*18 (E.D. La, Oct. 25. 2002) (awarding \$3,000 incentive compensation to named plaintiff  
16 in FDCPA class action where 142 members shared class recovery of \$3,000). An  
17 incentive award which is substantially more than each individual class member can  
18 expect to recoup is authorized by the FDCPA. *Bonett*, 2003 U.S. Dist. LEXIS 9757, \*23  
19 n.5 (*citing Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 472 (E.D. Pa. 2000)).  
20

21 Recognizing her responsibilities as the class representative, Plaintiff has taken  
22 significant actions to protect the interests of the class. *See* Corsick Decl. She selected  
23 counsel qualified and experienced in unfair debt and other consumer litigation, including  
24

1 class action lawsuits. *See* Corsick Decl. In this regard, Plaintiff elected to file the lawsuit  
2 as a class action in order to represent the interests of the putative class members. *See*  
3 Corsick Decl. Based on her involvement and participation in this case, the Court is  
4 requested to approve an incentive award for Plaintiff in the amount of \$1,000.

5  
6 ***C. Cy Pres Award***

7 The proposed settlement provides that funds from any returned or un-cashed  
8 settlement checks shall be paid to Santa Clara Law School Legal Clinic as a *cy pres*  
9 award for use in consumer representation and education.

10  
11 ***D. Attorney's Fees, Costs and Expenses***

12 Plaintiff and the Class will not incur any attorney's fees, costs or expenses.  
13 Pursuant to 15 U.S.C. § 1692k(a)(3) and Cal. Civil Code § 1788.30(c), Class Counsel  
14 will receive \$20,750 for attorneys' fees, costs, and expenses to be paid by West, subject  
15 to court approval. Class Counsel will not request additional fees, costs, or expenses from  
16 West or the class members and West will not oppose or cause to be opposed any  
17 application for the total attorneys' fees, costs, and expenses in an amount not to exceed  
18 \$20,750. Class Counsel will file a petition prior to the final approval hearing in support  
19 of the application for attorneys' fees, costs, and expenses.

20  
21 **3. The Experience And Views Of Class Counsel**

22 The settlement was negotiated at arms length by experienced and capable Class  
23 Counsel, who now recommend its approval. As proven by the affidavit of Class Counsel  
24 filed herewith, Class Counsel are experienced consumer class action lawyers. Given that

1 experience and expertise, Class Counsel are well qualified to assess the prospects of their  
2 case and to negotiate a favorable resolution for the class. Counsel for plaintiff and the  
3 proposed class believe that the settlement of this action on the terms and conditions set  
4 forth in the Agreement is fair, reasonable, and adequate, and would be in the best interest  
5 of the class members.

6

7 **4. The Stage Of The Proceedings And The Amount Of Discovery Completed**

8 Class Counsel have conducted informal discovery and investigated key factual  
9 issues in this case. Given the investigation completed to date, the Parties have exchanged  
10 sufficient information to make an informed decision about settlement. *See Linney, supra*,  
11 at 1239.

12

13 **D. Class Action Is Superior To Other Available Methods Of Resolving The Controversy**

14 A court will balance in terms of fairness and efficiency, the merits of a class action  
15 against alternative methods of adjudication to determine if a class action is superior.  
16 *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 632 (3d Cir. 1996). The Court is  
17 required to determine the best available method for resolving the controversy and must  
18 “consider the interests of the individual members in controlling their own litigation, the  
19 desirability of concentrating the litigation in the particular forum, and the manageability  
20 of the class action.” *Ballard v. Equifax Check Services, Inc.* 186 F.R.D. 589, 600 (E.D. Cal.  
21 1999). It is proper for a court in deciding the “best” available method, to consider the  
22 “inability of the poor or uninformed to enforce their rights, and the improbability that  
23

1 large numbers of class members would possess the initiative to litigate individually.”

2 *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7<sup>th</sup> Cir. 1974).

3  
4 In this case, there is no better method available for the adjudication of the claims  
5 which might otherwise be brought by each individual debtor who was subjected to  
6 Defendant’s practice. *See Zinberg v. Washington BaWestrp., Inc.*, 138 F.R.D. 397, 410-  
7 411 (D.N.J. 1990); *see also Clark, supra*. The efficiency of consumer class actions is  
8 recognized particularly where the individual’s claim is small.

9  
10 In this instance, the alternative methods of resolution are  
11 individual claims for a small amount of consequential  
12 damages . . . . Thus, many claims could not be successfully  
13 asserted individually. Even if efficacious, these claims would  
14 not only unnecessarily burden the judiciary, but would prove  
15 uneconomic for potential plaintiffs. In most cases, litigation  
16 costs would dwarf potential recovery. In this sense, the  
17 proposed class action is paradigmatic. A fair examination of  
18 alternatives can only result in the apodictic conclusion that a  
19 class action is the clearly preferred procedure in this case.

20  
21 *Hanlon, supra*, at 1023. Moreover, “the size of any individual damages claims under the  
22 FDCPA are usually so small that there is little incentive to sue individually.” *Ballard, supra*, at 600. Class certification of an FDCPA damage action will provide an efficient  
23 and appropriate resolution of the controversy. *See Irwin, supra; Ballard, supra*.

24  
25 Given the number of individual lawsuits that would be required if a class were not  
26 certified, a class action presents a superior method to fairly and efficiently adjudicate all  
27 of the claims of the settlement class members in this case, within the meaning of Rule  
28 23(b)(3). To the extent that any Class member wishes to pursue any such individual

1 claim, he or she is free to opt out of the settlement under Rule 23 (b)(3). Thus, the  
2 certification of this action is the superior method to resolve the controversy presented  
3 here.  
4

5 **V. CONCLUSION**

6 For the foregoing reasons, the parties respectfully request that the Court enter an  
7 order in the form lodged herewith, which (i) certifies a class for settlement purposes; (ii)  
8 grants preliminary approval of the Class Action Settlement Agreement; (iii) appoints O.  
9 Randolph Bragg, Esq., Horwitz, Horwitz & Associates, and Ronald Wilcox, Esq., as class  
10 counsel; (iv) approves the proposed form of Notice (contained in Exhibit C to the  
11 Agreement) and method of providing Notice to the class; (v) sets the date by which class  
12 members must request exclusion or make objection to the proposed settlement; and (vi)  
13 schedules a hearing for final approval (the “Fairness Hearing”) under Fed. R. Civ. P.  
14 23(e)(3).  
15  
16

17 The parties request 20 days from the date of the Court’s entry of the Order of  
18 Preliminary Approval of Class Action Settlement to cause notice to be mailed to the  
19 class. The parties also request that the class members be allowed 50 days from the  
20 Court’s entry of the Order of Preliminary Approval of Class Action Settlement to exclude  
21 themselves (“opt-out”) from the settlement or object thereto. Lastly, the parties request a  
22  
23

24       ///  
25  
26       ///  
27  
28       ///

1 date for a hearing on the fairness of the settlement at least 40 days following the class  
2 members' deadline to opt-out or object, so that the class members' submissions can be  
3 processed.  
4

5 Respectfully submitted,  
6

7 Horwitz, Horwitz & Associates  
8

9 Dated: 6/22/10

10 /s/O. Randolph Bragg  
11 O. Randolph Bragg  
12 Counsel for Plaintiff  
13 Virginia Corsick  
14

15 Dated: 6/22/10

16 /s/ Ronald Wilcox  
17 Ronald Wilcox  
18 Counsel for Plaintiff  
19 Virginia Corsick  
20

21 Sessions, Fishman, Nathan & Israel, L.L.P.  
22

23 Dated: 6/22/10

24 /s/Debbie P. Kirkpatrick  
25 Debbie P. Kirkpatrick  
26 Counsel for Defendant  
27 West Asset Management, Inc.  
28